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In The

Supreme Court of the United States

October Term, 1983

ABRAHAM LEVINE, as Administrator of the estate of FANNIE LEVINE, deceased, for a judgment pursuant to Article 78 of the

Petitioner,

vs

BARBARA BLUM, as Commissioner of the New York State Department of Social Services, DAVID AXELROD, as Commissioner of New York State Department of Health, Office of Health Systems Management (hereafter called Agency).

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether or not the respondents' refusal to grant medical assistance with "reasonable promptness" constituted a violation of the due process clause of the 14th amendment of the United States Constitution, and the Federal Social Security Act, and/or the Federal Code of Regulations promulgated thereunder?
2. Whether or not the denial of medical assistance to the claimant, a medicaid recipient, while an in-patient in the hospital, and recommended by her treating physicians that she have private duty nursing services around the clock, 24 hours a day, seven days a week, was in violation of the Federal Social Security Act, and/or the due process clause of the 14th amendment of the U.S. Constitution?
3. Whether or not bureaucratic (admin-

istrative) delays in rendering "fair hearing decisions" and in scheduling hearing mandated by the federal Social Security Act and Administrative Procedures Act constituted a violation of due process?

4. Whether or not the petitioner who succeeded and prevailed in article 78 proceedings is entitled to an award of reasonable attorney's fees in the absence of special circumstances which would render such an award unjust pursuant to Title 42 U.S.C. section 1988 (The Civil Rights Attorneys's Fee Award Act of 1976)?

5. Whether or not the facts alleged present a constitutional question which might in itself entitle petitioner to an award of attorney's fees even in the absence of a statutory violation?

TABLE OF CONTENTS

Questions Presented for Review.....1

Table of Contents.....iii

Table of Citations.....iv

Opinions Below.....2

Jurisdiction.....2

Constitutional Provisions Involved.....2

Statement of Material Facts.....2

Reasons for Granting the Writ:

The respondents' arbitrary and capricious refusal to grant medical assistance withour delay constitutes a denial of petitioner's right to due process clause of the United States Constitution, the Federal Social Security Act, and the Code of Federal Regulations promulgated, thereunder.12

Conclusion.....41

APPENDIX

Order of Special Term,filed Oct. 18,1982.1a

Order of the Appellate Div.of the Supreme Court of the State of N.Y., Second Judicial Department, Kings Cty filed, 1/9/84---2a

Order of the New York State Court of Appeals,filed on April 3,1984.....3a

TABLE OF CITATIONS

Lawrence v. Lavine, 375 N.Y.S. 2d 587, 50 A.D. 2d 734.....13

Maine v. Thiboutot, 448 U.S. 1, 65 L Ed. 2d 555..... 16,38

Martin v. Blum, 87 A.D. 2d 688, 448 N.Y.S. 2d 873 (1982).....16

Matter of McNeil v. Shang, 69 A.D. 2d 985, 416 N.Y.S. 117 (1979) 4th Dept.....17

Matter of Holley v. Blum, 75 A.D. 2d 998, 429 N.Y.S. 2d 103 (1980) 4th Dept.....17,29

Rohmey v. Blum, 95 A.D. 2d 294.....17

Rodway v. U.S. Dept. of Agriculture, 514 F. 2d 809 (1975).....18

Morton v. Ruiz, 415 U.S. 199.....18

Kempe v. U.S., 151 F. 2d 680.....18

A.S. Rampell, Inc. v. Hyster Co., 3 N.Y. 2d 369, 165 N.Y. 2d 475.....19

De Witt v. N.Y.C.R. Co., 119 Misc. 456, 196 N.Y.S. 870, aff'd. 206 A.D. 638, 198 N.Y.S. 909....19

795 Fifth Ave. v. City of New York, 208 N.Y.S. 2d 801 rev. on other grounds, 13 A.D. 2d 733, 215 N.Y.S. 2d 391.....18

Buckton v. National Collegiate Athletic Assn., 436 F. Supp. 1262....20

TABLE OF CITATIONS
(Continued)

White v. New Hampshire Dept. of Employment Security 102 S. Ct. Reporter 1162.....22

Knighton v. Watkins, 616 F.2d 795, 797.....23

Sprague v. Ticonic National Bank, 307 U.S. 161, 836 L. Ed. 1184 (1939).....22

Northcross v. Bd. of Ed. (Memphis), 412 U.S. 427, 37 L. Ed. 2d 48 (1973).....25

Hummell v. S.E. Rykoff & Co., 634 F. 2d 446 (1980) 9th Cir.....26

Ironworkers Local #272 v. Brown, 624 F. 2d 1255, 1266 5th Cir. (1980).....26

Mid-Hudson Legal Services v. G & U, Inc., 578 F. 2d 34, 37-38...28

Johnson v. Blum, 58 N.Y. 2d 454.....29

Zarcone v. Perry, 581 F. 2d 1039, 1042.....29

Newman v. Piggie Park Enterprises, Inc. 390 U.S. 400 (1968).....27,28

New York Gaslight Club v. Carey, 447 U.S. 54, 63-64; 65 L. Ed. 2d 723, 734, 100 S. Ct. 2024, 2033 (1980).....28

TABLE OF CITATIONS
(Continued)

Population Services Int'l v. Carey, 476 F. Supp 4 (S.D.N.Y. 1979).....30

Johnson v. State of Mississippi, 608 F. 2d 635 (5th Cir. 1970).....30

Mayer v. Gagne, 100 S. Ct. 2570, 2575 (1980).....30,31

Hutto v. Finney, 437 U.S. 678, 693-700 (1978).....30

Fusari v. Steinberg, 419 U.S. 379.....33

Nelson v. Sugarman, 361 F. Supp. 1132.....33

Jeffries v. Swank, U.S. Dist. Court N.D. 111 Ed (12/31/71).....34

Aroune v. Sipprell, 57 Misc. 826...34,35

Cisco v. Levine, 72 Misc. 2d 1009, 340 N.Y.S. 2d 275.....35

Perez v. Lavine, 378 F. Supp. 1390....33

Carey v. Phiphus, 435 U.S. 247, 257.....39,40

U.S.Court of Appeals for Dist. of Columbia.....40

U.S. v. Classic, 312 U.S. 299, 326, 61 S. Ct. 1031, 1043.....39

Contents
Statutes Cited

Chapter 444 L. 1979.....6,7,8

Social Security Act (Title 42 U.S.C.
sec. 1351 and
sec. 1396.....12,13,14,16,18

Code of Federal
Regulations...12,13,15,17,18,32,34

Title 42 U.S.C. Sec. 1396 and 1351
et seq.....14,32,33

Title 42 U.S.C.
Sec. 1988.....14,16,17,21,32
Title 42 U.S.C.
Sec. 1983.....7,14,16,17,21,32,34

Title 28 U.S.C. section 1257 (3).....2

UNITED STATES CONSTITUTION CITED
Fourteenth Amendment.2,21,32,34,39

Other Authority Cited

H. Rep. No. 94-1558-94th
Cong. 2nd Sess.....28

S. Rep. No. 94-1011 p.5
(1976).....27,28

Administrative News.....28

Goldman, Administrative
Delay, Judicial Relief.....37

Yale L.J. 574 (1962-3).....35

66 Mich Law Rev 1423.....35

Federal Rules of Civil
Procedure..... 19

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vs

BARBARA BLUM, as Commissioner of the New York State Department of Social Services, DAVID AXELROD, as Commissioner of the New York State Department of Health, Office of Health Systems Management (hereafter called Agency).

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, ABRAHAM LEVINE, hereby petitions for a writ of certiorari to review the decision of the New York State Court of Appeals denying leave to appeal.

OPINIONS BELOW

The courts below did not render any opinion. Copies of the orders of these courts are contained in the appendix to this petition.

JURISDICTION

The decision of the New York State Court of Appeals of which review is sought is dated April 3, 1984. This Court has jurisdiction to review the judgment hereby by reason of the provisions of section 1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV of the United States Constitution provides:

> "Nor shall any State deprive any person of life, liberty, or property without due process of law."

STATEMENT OF MATERIAL FACTS

ABRAHAM LEVINE, petitioner and attorney herein, was appointed as an Administrator of the estate of Fannie

Levine by the Surrogate of Kings County on July 7, 1980.

The claimant, Fannie Levine, age 97, a medicaid recipient, was admitted in the Kings Highway Hospital on July 6, 1979 where she was confined until July 30, 1979 (first admission). Her condition was grave. She was suffering from congestive heart failure, arteriosclerotic heart disease, fractured hip and other serious medical conditions. She was bedridden, disoriented, had to be fed and totally incapacitated.

Her treating physician, a cardiologist, recommended private duty nursing care on a 24 hour basis, 7 days a week since she required constant, continuous and individual care.

During her second admission at the same hospital, her treating physician again recommended private duty nursing care since her condition remained the

same. She was confined from September 29th, to November 9, 1979 when she died.

The claimant's condition remained critical. That emergency could not wait upon respondents' time consuming process to decide whether she was entitled to medical assistance. The petitioner, an attorney, was needed to assist claimant during State court proceedings.

Although petitioner requested private duty nursing care on at least four occasions in July, 1979, the respondent ignored these requests and refused to provide these services. As a result thereof, petitioner was compelled to pay out of his own pocket for these nursing services around the clock, seven days a week covering both periods of hospitalization.

The total amount expended for these nursing services amounted to over $10,000.00.

On September 14, 1979 her treating physician wrote to respondent agency requesting nursing care 24 hours a day, seven days a week. On October 3, 1979 the agency rejected the doctor's request. The reason given was that date of payment for such services had not as yet been determined.

On October 9, 1979 her doctor again wrote to the agency requesting private nursing care. The agency again rejected his request. Since then three additional medical reports were sent to this agency setting forth the nature of her perilous condition and the fact that her condition did not warrant care in the intensive care unit, and further, that the nurses on the floor were totally inadequate to care for her condition. Each of those reports was rejected.

In July 1979 petitioner submitted a

Budget report dated July 5, 1979 to respondent Blum. This report was approved by the governor on July 5, 1979, Session 1979-1980 which amended Sec. 365-a of Social Service law by providing for private duty nursing care effective April 1, 1979 under the Medical Assistance Program and it was retroactive to this date. Yet, on December 11, 1979 respondent Blum issued an administrative directive, same date, which provided that payment for these services could not be made until after October 9, 1979, the date when the regulations were filed with the Secretary of State.

Clearly the respondent's failure to abide by this report is indicative of bad faith.

Importantly, the court will note that Chapter 444 of the laws of 1979 in amending section 365-a of the Social

Service Law provided for private duty nursing services for medicaid recipients effective April 1, 1979. The respondent violated this law by altering the effective date to 10/9/79.

This action by the respondent clearly deprived the claimant of a right secured by the "Constitution and Laws" within the language of Title 42 U.S.C. Section 1983.

In addition, the court will note that respondent's own regulation (10 NYCRR Sec. 85.33 (c)) also provided for private duty nursing on recommendation of the claimant's treating physician.

On October 9, 1979 petitioner requested a fair hearing and one was held on December 14, 1979 before a hearing officer designated by respondent Blum. After a lapse of four months, respondent Blum affirmed the agency's determination for the reason that since

the regulations were not implemented until October 9, 1979, no payment could be made for private duty nursing service prior to that date in violation of Chapter 444 of the laws of 1079.

FIRST ARTICLE 78 PROCEEDING

On May 20, 1980 petitioner commenced this proceeding at Special Term, Kings County (Bernstien, J.) to annul the determination of respondent Blum, and for reimbursement to the petitioner for out of pocket expenses for private duty nursing care on behalf of his mother.

On October 21, 1980, special term granted the petition and annulled the determination made by respondent Blum. The court in its decision held that the determination made by respondent Blum was contrary to the wording of the statute (Chap. 444 L' 79), "had no basis in law and was arbitrary and

capricious," and "remanded to the respondent for further proceeding not inconsistent with the court's decision." Judgment was entered on 12/8/80.

This was not a judgment on the merits, since the only issue resolved by the court involved the effective date of the statue.

Government officials may not be accorded unfettered discretion in making decisions that impinge on fundamental rights.

The remaining issue involving private duty nursing services was not resolved by the respondent until January 6, 1982, a lapse of one year after petitioner's request for a hearing in January, 1981.

The respondent after a fair hearing held on June 30, July 1 and July 2, 1981 finally reversed the agency's determination and directed reimbursement

to the petitioner, indicating in its decision that the testimony of its own witness was not credible. (1st hospital admission)

Although the petitioner requested a hearing in January, 1981, the hearing was finally held on June 30, 1981, a lapse of five (5) months, clearly indicative of unjustified bureaucratic delay in violation of due process.

At these hearing the medical testimony of her treating physician, uncontradicted, overwhelmingly showed that the petitioner was entitled to medical reimbursement; that the perilous condition of the claimant required private duty nursing services around the clock on a 24 hourly basis, 7 days a week. Respondent's witnesses admitted that no medical examination had been made of claimant during both periods of hospitalization, never visited the hospital

or ever conferred with her doctor concerning her condition.

Claimant's doctor also testified that she was definitely not a candidate for the intensive care unit, and that the staff nurses were inadequate to care for her needs.

These unjustified delays brought about by the respondents have never been denied during the course of these proceedings, or even mentioned to the courts below.

SECOND ARTICLE 78 PROCEEDING

This proceeding was commenced on October 8, 1980. This matter came on to be heard before Special Term (Shaw, J.) on January 14, 1981. After due consideration, the court granted the petition, nullified the determination of respondent Blum, granted the petition and ordered reimbursement to the petitioner.

Importantly, the petition herein verified October 8, 1980 set forth violations of Title 45 of the Code of Federal regulations and cited violations of the Federal Social Security Act (Title 42 U.S.C. section 1396 d, subd. a, par. 8) which provided for private duty nursing care for medical recipients, and Title 42 U.S.C. section 1351 et seq. Title 18 NYCRR sec. 505.1 (a) (2) also provided for private duty nursing care in a hospital. (Emphasis supplied)

The respondent had improperly withheld this information from the courts below.

REASONS FOR GRANTING THE WRIT

The respondents' arbitrary and capricious refusal to grant medical assistance without delay constitutes a denial of petitioner's right to due process clause of the 14th Amendment of

the U.S. Constitution, the Federal Social Security Act, and the Code of Federal Regulations promulgated thereunder.

> "A state***to qualify for***funds from the federal government must conform to the guidelines promulgated by Congress." (Title 42 U.S.C. Sec. 1351 et seq.) Lawrence v. Lavine, 375 N.Y.S. 2nd 587, 50 A.D. 2nd 734)

The respondent herein failed to conform to these guidelines by denying medical assistance mandated by the Federal Social Security Act and the Code of Federal Regulations promulgated thereunder.

The nursing care services were needed for claimant's proper treatment and were recommended by her physician. (See 18 NYCRR sec. 368.2 (g) (2) which provides in pertinent part:

> "When recommendations are made by a physician for medical care***the agency has the responsibility to assist client to get such care."

The Civil Rights Attorney's Fee Award Act (Title 42 U.S.C. Section 1988) provides in pertinent part:

> "In any action or proceeding to enforce a provision of section(s) ***1983***the court, in its discretion, may allow the prevailing party, other than United States, a reasonable attorney's fee as part of the costs."

Title 42 U.S.C. Section 1983 imposes liability on those under color of law, custom or usage of any State or Territory depriving citizens of the United States or other persons of any rights, privileges or immunities secured by the Federal Constitution and Laws.

The Social Security Act (as Title 42, section 1396 d, subd. a par. (8) is a federal statute. The sections of the code of federal regulations, Title 45, were promulgated under this statute.

The respondent's denial of medical assistance mandated under this statute constitutes a violation within the pur-

view of section 1983 since the petitioner was denied a right secured by the "Constitution and Laws." (Emphasis supplied)

The fact that the petition herein does not mention the words: "Section 1983" does not defeat, prevent, or diminish the petitioner's right to attorney's fees under section 1988. In effect, this is a procedural matter.

Suffice to say that the federal statute and the Code of Federal regulations were specifically alleged in the petition. The respondent was well aware of that fact, and could not claim in good faith that it had no knowledge of them. The respondent at no time ever referred to these allegations before the lower courts. Yet, the respondent denies any violation of any federal statute.

The broad and general purpose of

federal statutes is to protect the right of medicaid patients under the Federal Social Security Act, and the benefits provided by the Medical Assistance Program.

In Main v. Thiboutot - 448 U.S. 1, 65 L. Ed 2nd 555 (6/25/80) the court held:

> "...Congress attached no modifiers to the phrase "and laws" including cases under the Social Security Act" that Sec. 1983 remedy encompasses violations of federal statutory as well as Constitutional Law" (Emphasis supplied)

CODE OF FEDERAL REGULATIONS

In Martin v. Blum - 87 A.D. 2nd 688, 448 N.Y.S. 2nd 873 (1982) Petitioner sought an award of attorney's fees and argued, inter-alia that an application for fees under sec. 1988 was appropriate because of a violation of a federal regulation and/or statute it implements. (Emphasis supplied) The court held:

"State appellate courts, in interpreting 42 USC Sec. 1988, have easily concluded that it is appropriate to award counsel fees involving regulations promulgated under federal statutory authority" CF

Matter of Holley v. Blum
75 A.D. 2nd 998
429 NYS 2nd 103 (4th Dept. (1980))

Matter of McNeil v. Shang
69 A.D. 2nd 985
416 NYS 117 (4th Dept. (1979))

In the McNeil case, supra, the court held that the petitioner is entitled to an award of fees where a federal regulation had been violated (see 42 U.S.C. Sec. 1983) (Emphasis supplied)

In Rohmey v. Blum - 95 A.D. 2nd 294, the court awarded attorney's fees on the ground that the agency violated a right secured by the Food Stamp Act of 1964, or of the federal regulations promulgated thereunder.

Importantly, the petition of 10/8/80 of the second article 78 pro-

ceeding did set forth not only violations of the Code of Federal regulations, but, in addition, violation of the Social Security Act. (Emphasis supplied)

Further the C.F.R. has the force and effect of law, and the courts are required to take judicial notice. (See Rodway v. U.S. Dept. of Agriculture - 514 F. 2nd 809 (1975); Morton v. Ruiz - 415 U.S. 199; Kempe v. U.S. - 151 F. 2nd 680.

As to the matter of liberality of pleadings, the court in the case of: 795 Fifth Ave. Corp. v. City of N.Y. 208 N.Y.S. 2nd 801 rev. on other grounds 13 A.D. 2nd 733, 215 N.Y.S. 2nd 391, the court said that the complaint must be liberally construed and be given a fair intendment, so that the facts which can be reasonably implied from the facts alleged must be considered as pleaded.

In AS Rampell, Inc. v. Hyster Co., 3 N.Y. 2nd 369, 165 N.Y.S. 2nd 475, the court held that the allegation of a complaint should be read liberally with a view toward substantial justice between the parties.

In De Witt v. NYCR Co. - 119 Misc. 456, 196 N.Y.S. 870, aff'd 206 AD 638, 198 N.Y.S. 909, the court held:

> "Liberality of practice in furtherance of justice is now the compelling mandate of our law."

Sec. 104 of the C.P.L.R. and the federal rules of civil procedure provides that the rules "shall be construed to secure just, speedy and inexpensive determination of every action"

As a further example of respondent's unjustified delay, a hearing held on June 30, 1981 was not finally acted upon until January 6, 1982, a lapse of five (5) months. (See pages 9 and 10 herein.)

Re: ATTORNEY'S FEES

Respondent argues that no request for attorney's fees was made in the petition of 10/8/80. Since the final issue covering the need for medical assistance pursuant to the order of special term (Bernstein, J.) was not determined until January 6, 1982 in favor of the petitioner by respondent Blum it would be proper to request a fee before then.

In Buckton v. National Collegiate Athletic Ass'n. - 436 F. Supp 1262 the court held that attorney's fees are generally requested after litigation is effectively terminated.

Importantly, the petitioner herein was successful and prevailed in both article 78 proceedings pursuant to Title 42 Section 1988 and should be granted attorney's fees. The denial of medical assistance mandated by the federal

Social Security Act constituted a violation of Title 42 U.S.C. section 1983. (Emphasis supplied)

THIRD Article 78 PROCEEDING

Approximately 3 1/2 months following the final determination of respondent Blum on January 6, 1982, the petitioner served and filed a verified petition dated April 3, 1982 for attorney's fees pursuant to Title 42 USC sec. 1988.

This petition set forth and alleged a total of thirteen (13) violations of the federal statute including violation of the due process clause of the 14th amendment of the U.S. Constitution. Yet the respondent argued that no cause of action was pleaded in that petition under section 1983. Further, that this was an afterthought by the petitioner. The petitioner had every legal right to make such an application under the

statute. (Emphasis supplied)

This application, however, was denied by special term (Feldman, J.) without opinion. (Emphasis supplied) Judgment was entered on October 18, 1982.

In White v. New Hampshire Dept. of Employment Security, 102 S. Ct. Reporter 1162 (3/2/82) the court held that the petitioner who filed an application for attorney's fees 4 1/2 months after the entry of judgment was entitled to attorney's fees even though the complaint made no request for attorney's fees. (Emphasis supplied)

In Sprague v. Ticonic National Bank, 307 US 161, 59 S. Ct 777, 83 L Ed 1184 (1939) the court held that the petition for reimbursement represented an independent proceeding supplemental to the original proceeding; that the award "attorney's fees was uniquely

separable from the cause of action to be proved at the trial."

The court rejected arguments that the request sought an impermissible reopening of the underlying action. Further, the court considered the power of a federal court to award counsel fees pursuant to an application filed several years after the entry of judgment on the merits; that the right of attorney's fees was not waived for failure to claim it in the original suit. Petitioner was awarded attorney's fees. (Emphasis supplies)

In Knighton v. Watkins (5/7/80), 616 F 2nd 795, 797 (5th Cir. 1980) the court held:

> "there is no jurisdictional time on filing a motion seeking such fees" (Emphasis supplied)

The respondent further contends that the seeking of such fees was a surprise. Yet, the respondent's

attorney in her affidavit dated 5/21/82 in opposition to petitioner's application for fees makes no such argument, clearly an afterthought by the respondent. Neither, does the respondent show in what manner or on what basis the element of surprise occurred.

In White case, supra, the parties entered into a consent decree, approved by the court, and judgment was entered. Respondent's counsel claimed surprise by petitioner's post judgment request for fees. Respondent averred that the court decree decree waived any claim for fees; that its liability was fixed by the consent decree and could not have entered into a settlement knowing that further liability might still be established. The District court denied respondent's motion to vacate the decree and awarded attorney's fees. The District court's decision was affirmed

by the U.S. Supreme Court. (Emphasis supplied)

Re: NO OPINION RENDERED BY THE COURTS BELOW

1. No opinion was rendered by special term (Feldman, J.)
2. No opinion was rendered by Appellate Division of the Supreme Court, Second Judicial Department.
3. No opinion was rendered by the New York State Court of Appeals.

The U.S. Supreme Court encountered an identical situation in Northcross v. The Bd. of Education of Memphis City - 412 US 427 37 L. Ed 2nd 48 (1973)

The plaintiff sought attorney's fees. The court of Appeals denied the motion for fees without stating reasons for denial. The U.S. Supreme Court remanded case for the following reason:

> "Since it is impossible for us to determine whether the Court of Appeals applied this standard and, if so, whether it did so correctly, we grant the petition for certiorari, vacate the judgment below insofar as it relates to attorney's fees and remand to the Court of Appeals for further proceedings consistent with this opinion. (412 U.S. at 428-429, 37L Ed 2nd at 51)

The rule requiring a court to specify the reasons for the denial has been followed in numerous cases. See Hummell v. S.E. Rykoff & Co., 634 F. 2nd 446 (1980) 9th circuit vacated denial of fees and remanded the matter to lower court for failure to specify reasons for denial OF FEES.

See also Ironworkers Local #272 v. Brown, 624 F. 2nd 1255, 1266 (5th Cir. 1980).

The Supreme Court has recently ruled:

> "The frequent failure of State courts to specify the grounds of their decisions has often led the courts into uneasy explorations of

> State Constitutions and statute books in an effort to decided whether a decision was based on "adequate and independent grounds."

Petitioner's grounds for relief as indicated herein concerned violations of federal and statutory law.

The courts below erred by failing to award petitioner attorney's fees under 42 USC section 1988, which requires awards of attorney's fees to prevailing section 1983 plaintiffs in the absence of special circumstances which would render such an award unjust.

No reason for such denial was given by these courts.

The Senate report accompanying this legislation stated as follows:

> "It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by (the Fees Act), if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render an award

unjust." Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968), S. Rep. No. 94-1011, 94th Cong., 2d Sess., 4 (1976) U.S. Code Cong. Adm. News 5912.

The House report as well endorsed the Newman approach. H.R. Rep. No. 94-1558, 94th Cong. 2d Sess., 6 (1976).

The U.S. Supreme Court reiterated this position in reviewing the attorney's fee award made under a parallel Title VII fees statute in New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 63-64; 65 L Ed 2nd 723, 734; 100 S. Ct 2024, 2033 (1980); by holding that "the court's discretion to deny a fee award to a prevailing plaintiff is narrow. Absent special circumstances (citations omitted) fees should be awarded." (See Mid-Hudson Legal Service. Inc. v. G&V, Inc. 578 F 2d 34 (1978), which involved a claim for attorney's fees under section 1988. (Emphasis supplied)

In the Matter of Johnson v. Blum, 58 N.Y. 2d 454 the court held:

> "....that respondent's establish special circumstances which militate against awarding a fee to a successful party. (Mid-Hudson Legal Services v. G&U, supra. They do not meet the burden solely by submitting evidence...that the relief afforded is personal to the petitioner."

See Zarcone v. Perry, 581 F 2nd 1039, 1042.

The burden is upon the respondent to show special circumstances which it failed to do.

Respondent Blum ignores the well settled rule that Section 1988 fees should be awarded even if only an individuals rights have been violated, or relief is sought solely got individuals. (See Zarone v. Perry, supra)

In Holley v. Blum, supra, the court held:

"...recent decisions of the Supreme

> Court and of this court make it clear that none of these factors prevents an award of attorney's fees as a matter of law."

In this case plaintiffs were entitled to fees because they succeeded on their claim under the Federal Social Security Act. See Hutto v. Finney, 437 U.S. 678, 693-700 (1978), Population Services International v. Carey, 476 F. Supp 4 (S.D. N.Y. 1979), Johnson v. State of Mississippi, 608 F 2nd 635 (5th cir. 1979).

Since the petitioner is the successful party, and since there are no special circumstances an award of attorney's fees is proper (Title 42 U.S.C. Sec. 1988) (Emphasis supplied)

In Maher v. Gagne, 100 S. Ct. 2570, 2575 (1980) the court held:

> "We also find no merit in petitioner's suggestion that respondent was not the prevailing party within the meaning of section 1988. The fact that respondent prevailed through a settlement

rather than through litigation does not weaken a claim for fees."

The court further stated:

"Nothing in the language of section 1988 conditions the District court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated."

See S. Rep No. 94-1011, p 5 (1976), U.S. Code Cong and Administrative News 1976, pp 5908, 5912.

The fact that the lower courts never decided the Constitutional issue is no ground for denial of attorney's fees as a matter of law. (Emphasis supplied)

In Mayer v. Gagne, supra, the court also held that the fact that the courts may not have granted judgment to petitioner on constitutional or federal grounds does not weaken petitioner's claim to fees.

The Senate report expressly stated

that:

> "for purposes of award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment, or without formally obtaining relief." See Northcross v. Memphis Bd. of Education, supra.

Section 1988 applies to all types of section 1983 actions including violations of the Social Security Act. (Emphasis supplied)

VIOLATIONS OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION

The 14th Amendment of the U.S. Constitution provides:

> "Nor shall any State deprive any person of life, liberty or property without due process of law."

Title 42 U.S.C. section 1396, subd (a) (1), par. 8 provides:

> "Medical assistance shall be furnished with 'reasonable promptness' to all eligible individuals."

To the same effect see: Title 45 CFR section 206.10 (a) (5) (i) adding

the words: "without delay."

There is precedent for the notion that bureaucratic delay in processing and approving a benefit to which a person is statutorily entitled to can amount to a deprivation sufficient to bring due process into play.

Title 42 U.S.C.A. section 1396 d subd. a includes under par. (8) private duty nursing services as defined by the term "medical assistance."

Cases involving violations of the due process clause due to bureaucratic delays are:

Nelson v. Sugarman - 361 F. Supp 1132 wherein the court held, inter-alia, that the alleged failure to implement fair hearing decisions on the eligibility of new applicants for public assistance violated the due process clause. See: Perez v. Lavine, 378 F. supp 1390, Fusari v. Steinberg, 419 US

379.

34 of the Social Services law (18 NYCRR, Sec. 358.18 provides that fair hearing decisions be issued promptly and within 90 days from the date request is made for a fair hearing. (45 CFR 206.10 (a) (3) violated the due process clause.

In Jeffries v. SWANK - U.S. District court N.D. Ill ED (12/31/71) the court held that the unjustified administrative delay to promptly implement "fair hearing" decisions and scheduling of hearings violated the due process clause of the 14th Amendment of the U.S. Constitution. (42 U.C.A. Section 1983).

The Medicaid Program was enacted for the benefit of the medically indigent, and nothing by statute or regulation can prevent the legislature in seeing that qualified persons not be denied benefits designed for him by the legislature. (Aroune v. Sipprell, 57

Misc. 826. See: 66 Mich L. Rev 1423 Limitations imposed by due process in dilatory behavior and arbitrary, capricious administrative behavior, Yale LJ 574 (1962-1963).

The touchstone of due process is protection of individuals against arbitrary action of the government.

In Cisco v. Lavine, 72 Misc. 2d 1009, 340 N.Y.S. 2d 275.

This case involved a delay in conducting fair hearings on applications for AFDC benefits beyond the sixty day period mandated by federal as well as state regulations requiring "reasonable promptness" in furnishing medical assistance (Social Security Act at Section 1396 a, subd. (a) par. (8). Violation of due process clause.

The following represents a list of bureaucratic delays prevalent in this matter:

1. The decision of special term (Bernstein, J.) rendered on October 21, 1980 granting the petition and remanding the matter to the respondent for further proceedings was not acted upon until March 20, 1981, a lapse of five (5) months. (Emphasis supplied)

2. Although petitioner requested a "fair hearing" in January 1981 following the entry of judgment on 12/8/80 (Bernstein, J.), a "fair hearing" was not held until June 30, 1981, a lapse of five (5) months and two (2) weeks. (Emphasis supplied)

3. Order of special term (Bernstein, J.) entered on December 8, 1980 granting the application, remanding the matter to the respondent for further proceedings was not finally acted upon until January 6, 1982, a lapse of one (1) year and four (4) weeks.

(Emphasis supplied)

4. Initial request for private duty nurses was made by her treating physician on September 11, 1979. Final decision was made by the respondent in favor of petitioner granting medicaid reimbursement on January 6, 1982, a lapse of approximately two (2) years and four (4) months. (Emphasis supplied)

At no time did the respondent during the entire course of these proceedings ever respond to or deny these unjustified administrative delays set forth herein.

The petitioner has a valid federal claim premised on both federal and constitutional grounds based on these dilatory delays. (See generally Goldman, Administrative delay and Judicial relief)

Clearly, the procedure followed by

the instant respondents (denying medical assistance to eligible applicants) until administrative remedies have been exhausted and three (3) Article 78 proceedings commenced cannot be deemed to furnish assistance with "reasonable promptness" particularly in the case of the instant claimant, a critically ill heart patient, age 97, who first sought assistance several times in November, 1979, and in September and October of 1979, and who has been through three (3) fair hearings and whose medical bills amounted to over $10,000.00.

Petitioner should be entitled to attorney's fees under section 1988 upon the ground that he had been deprived of a right secured by federal law (see Maine v. Thiboutot, supra).

The facts alleged herein present not only a constitutional question, but a federal question as well, even in the

absence of a statutory violation which might in itself entitle petitioner to an award of counsel fees.

Even violations of State laws could give rise to violations of due process clause of the 14th Amendment of the U.S. Constitution.

As the Supreme Court has stated:

> "the potential liability of section 1983 defendants for attorney's fees 'under section 1988' provides additional - and by no means inconsequential - assurance that agents of the State will not deliberately ignore due process rights." (Carey v. Piphus - 435 U.S. 247, 257 n 11 (1978)

The respondents affirmatively promoted a policy sanctioning the type of action which caused due process violations. (U.S. v. Classic) - 312 U.S. 299, 326, 61 S. Ct. 1031, 1043, 85 L Ed 1368 (1941)

It has been recognized that those who violate the Nations fundamental laws could not proceed with impunity. (Carey

v. Piphus,) 435 U.S. 247, 257.

The U.S. Court of Appeals for the District of Columbia held:

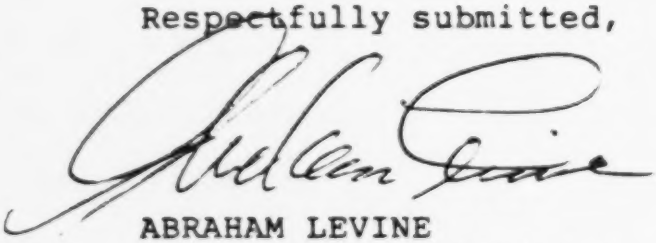
> "It was hard to imagine a more sorry performance of a Congressional mandate than that carried out by the respondents herein mandated under the Social Security Act and the Code of Federal Regulations implemented thereunder for medicaid recipients.
>
> Between inaction, foot-dragging and ultimate reversal, the record of the appellees is very muddy indeed.
>
> Failure to fulfill an undisputed statutory mandate in violation of what Congress commanded the Agency to do, nor is it reasonable behavior by an Agency established to execute policy, rather than achieve perfection in its execution."

The petitioner herein is vindicating a Congressional policy of the highest priority, and the respondents have violated not only federal law (The Federal Social Security Act), but the due process clause of the 14th Amendment of the U.S. Constitution.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted and upon granting certiorari, the court should reverse the determination of the New York State Court of Appeals, and the proceeding remitted to the Supreme Court for determination of counsel fees.

Respectfully submitted,



ABRAHAM LEVINE
Attorney for Petitioner

APPENDIX

MEMORANDUM ORDER

SUPREME COURT: KINGS COUNTY (Special Term, Pt.1)
By FELDMAN, J.

ABRAHAM LEVINE, as Admist- Dated Oct.12, 1982
rator of the Estate of Index No.10251/80
FANNIE LEVINE, dec., for a
judgment pursuant to Art.78,
CPLR

Petitioner

vs.

BARBARA BLUM, as Commissioner
of the N.Y. State Dept. of
Social Services, and DAVID
AXELROD, as Commissioner of
the N.Y. State Dept. of Health,
Office of Health Systems Manage-
ment.

Respondents.

Upon papers and oral argument, petitioner's application for attorney's fees is denied.

This decision shall constitute the order of the court.

ENTER

A.G.F.

Hon. Anne G.Feldman

Filed

Oct. 18, 1982

County Clerk
Kings County

At a Term of the Appell-
ate Divsion of the Supreme
Court of the State of N.Y.,
Second Judicial Department,
held in Kings County on
January 9, 1984

Hon. Milton Mollen, Presiding Justice,

Hon. Leon D. Lazer,)
Hon. William C. Thompson,) Associate Justices
Hon. Seymour Boyers.)

Abraham Levine,as Administrator,
etc.,

Appellant,

v. Order on Appeal from Order

Barbara Blum, as Commissioner
of the N.Y. State Department of
Social Services, et al.,

Respondents.

In the above entitled cause, the above named Abraham Levine, as Administrator, etc., petitioner,
having appealed to this court from an order of the Supreme Court, Kings County, dated October 12, 1982;
and the said appeal having been argued by Abraham Levine, Esq., appellant pro-se, and argued by Donna N. Miller, Esq, of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the order appealed from is hereby unanimously affirmed with costs.

Enter

Clerk of the Appellate Division

State of New York

Court of Appeals

At a session of the Court,
held at Court of Appeals
Hall in the City of Albany
on the third day of April
A.D. 1984

PRESENT, Hon. Lawrence H. Cooke, Chief Judge,
presiding

Mo. No. 211

In the Matter of Abraham Levine,
as Administrator etc.,

Appellant,

For a Judgment etc.,

vs.

Barbara Blum, as Commissioner of
the N.Y.State Department of Social
Services, et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Kathryn C. Brown
Deputy Clerk of the Court